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**IN THE
COURT OF APPEALS OF INDIANA**

EBONY DANCE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0609-CR-526

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G09-0510-FD-183512

July 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ebony Dance appeals her conviction for Theft,¹ a class D felony. Specifically, Dance argues that the trial court erroneously admitted evidence of prior uncharged thefts in violation of Indiana Evidence Rule 404(b). Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On October 22, 2005, Dance was employed as a store cashier in Speedway. Loss prevention trainer James Hull conducted a video surveillance of Dance pursuant to an instruction from loss prevention associate Patricia Mehaffey “due to theft concerns” regarding Dance. Tr. p. 22. While conducting the surveillance, Hull observed Dance place a pair of jeans in a customer’s bag without scanning the price tag. Subsequently, Hull interviewed Dance in the store’s loss prevention office. Hull questioned Dance about the incident and, about twenty minutes into the two-hour interview, Dance admitted that she had given the jeans away and wrote an “admission statement[.]” Id. at 66.

On October 23, 2005, the State charged Dance with class D felony theft. At Dance’s jury trial, the trial court permitted Hull to testify—over Dance’s objection—about a missing videotape of an October 11, 2005, incident in which Dance had allegedly committed other, uncharged acts of theft. On May 31, 2006, a jury found Dance guilty as charged, and on July 13, 2006, the trial court sentenced Dance to three hundred sixty-five days imprisonment, with three hundred sixty-one days suspended to probation. Dance now appeals her conviction.

¹ Ind. Code § 35-43-4-2(a).

DISCUSSION AND DECISION

Dance argues that the trial court erroneously permitted Hull to testify about the prior, uncharged thefts that allegedly occurred on October 11, 2005. The admission of evidence is within the sound discretion of the trial court, and we will not reverse the trial court absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. Johnson v. State, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Indiana Evidence Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” There are exceptions to the general rule if the evidence is designed to show “motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” Id.

At trial, Hull testified that Mehaffey had asked him to conduct the video surveillance of Dance “due to theft concerns” Tr. p. 22. When the State inquired into the basis for those concerns, Hull was prepared to testify that he had viewed a videotape² of Dance making similar, uncharged thefts on October 11, 2005. After Dance objected, the trial court held a hearing outside the presence of the jury and ultimately agreed to let Hull testify about the October 11 videotape:

² According to Hull, his employer was unable to locate the videotape itself. Tr. p. 27.

I do think [its] evidentiary value far outweighs the negative value of bringing in an additional incident. It is, in fact, the reason why the officer was concerned about the October 22nd, incident. The Court will give an admonition to the Jury that it may consider the October 11th incident solely on the issue as to why the officer was involved in the original investigation that occurred on October 11th, no way proves what did happen on October 22nd. [T]he State has charged the incident of October 22nd only. And that is the sole issue that would be in front of the jury.

Id. at 39-40.

The trial court explicitly stated—and admonished the jury—that it was admitting Hull’s testimony for the sole purpose of explaining his reasons for investigating Dance on October 22. But Hull’s reasons for conducting the investigation are entirely irrelevant to the determination of whether Dance was guilty of the charged theft. Consequently, we fail to see how Hull’s testimony regarding the October 11 incident is relevant to a matter at issue other than Dance’s propensity to commit the charged theft on October 22. The State does not contend that the testimony was admissible for any other, proper purpose under Rule 404(b). Thus, Hull’s testimony about the uncharged thefts is irrelevant and inadmissible. See Ind. Evidence Rules 401 (providing that relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”), 402 (providing that “[e]vidence which is not relevant is inadmissible”). Under these circumstances, the trial court abused its discretion in admitting that testimony.

With that being said, we examine the remaining, properly admitted evidence in the record supporting Dance’s conviction. Without objection, the trial court permitted the jury to view a portion of the October 22 videotape purporting to show Dance allowing a customer to

leave the store without being charged for a pair of jeans. Also without objection, Hull testified that Dance admitted to giving away the jeans.³ Over Dance's objection, the trial court admitted a redacted copy of her written admission statement:

I Ebony have hook people up [Hull] and I talk about me hook people
Its wrong I wasn't think at the time When I just went ahead hook
people I just hook them up for money I sorry for what I have done I
promise it willn't [sic] happen I don't want to go to jail I never I don't
see it I have two children I be making a bad example Please I sorry

State's Ex. 2.⁴

Inasmuch as the videotape and Hull's testimony corroborate Dance's confession, we conclude that the probable impact on the jury of the improper testimony regarding the October 11 thefts was sufficiently minor so as not to affect the substantial rights of the parties. See Browning v. State, 775 N.E.2d 1222, 1226 (Ind. Ct. App. 2002) (holding that the admission of evidence in violation of Rule 404(b) will be deemed harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the parties' substantial rights). Thus, although the trial court's decision to admit Hull's testimony regarding the October 11 thefts was erroneous, its error was harmless and not reversible.

³ Dance testified that she confessed only because Hull told her that she could go home if she did so. Tr. p. 93. But it is for the trial court to judge the credibility of witnesses and to weigh the evidence, and we will not second-guess that analysis on appeal. See Johnson, 831 N.E.2d at 168-69.

⁴ Dance also argues that this admission statement impermissibly refers to prior uncharged acts of theft in violation of Rule 404(b). As redacted, however, it is unclear whether the statement refers to prior uncharged thefts. Thus, the trial court properly allowed the jury to determine the statement's meaning and evidentiary weight. Furthermore, the statement is relevant to Dance's motive and acknowledgement of guilty, and we cannot say that its probative value is substantially outweighed by the danger of unfair prejudice. We find, therefore, that the trial court did not abuse its discretion in admitting this statement.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., concurs.

CRONE, J., dissents with opinion.

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CRONE, Judge, dissenting

I agree with the majority that the trial court improperly admitted Hull's testimony regarding his observation of the missing October 11 videotape that purportedly showed Dance committing uncharged thefts. The majority correctly observes that the admission of evidence in violation of Evidence Rule 404(b) will be considered harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the parties' substantial rights. Slip op. at 5 (citing *Browning*, 775 N.E.2d at 1226). I

believe that the impact of the improperly admitted evidence on the jury, in light of all the evidence, significantly and detrimentally affected Dance's substantial rights.

The videotape of the charged October 22 theft is hardly "overwhelming" evidence of Dance's guilt, as the State claims. Appellee's Br. at 4.⁵ The redacted copy of Dance's written admission statement is so ambiguous as to have minimal probative value. We are left with Hull's testimony that Dance confessed and Dance's testimony that Hull told her that she could go home if she confessed. In light of this meager and conflicting evidence, I cannot conclude that the jury was unaffected by the erroneous admission of Dance's uncharged thefts. I believe that we should reverse Dance's conviction and remand for a new trial. Therefore, I respectfully dissent.

⁵ The videotape shows Dance conducting dozens of transactions at her cash register over the course of several hours on October 22. The customer in question put two pairs of shoes, two handbags, and two pairs of jeans on Dance's counter and subsequently decided to purchase only one of each item. Dance scanned the price tags on the shoes and the handbag and placed them at the end of the counter. Dance then removed an anti-shoplifting sensor from the jeans and placed them on the counter in front of her without scanning the price tag. The customer then placed the jeans on top of the other items at the end of the counter. A close-up shot of the register shows that the customer was charged for only two items, for which she paid in cash. Dance placed all three items in a bag, and the customer left the store. Standing alone, the videotape could lead a reasonable juror to find that Dance's failure to scan the jeans' price tag was inadvertent, rather than intentional.